

Supreme Court, U. S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

No.

~~77 - 968~~

THE DETROIT EDISON COMPANY,  
*Petitioner.*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

BRIEF OF AMERICAN PSYCHOLOGICAL  
ASSOCIATION AS AMICUS CURIAE IN  
SUPPORT OF THE PETITION FOR A  
WRIT OF CERTIORARI

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**INTEREST OF AMICUS CURIAE**

The American Psychological Association ("APA"), a non-profit professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the Association, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The Association numbers almost 40,000 and includes the vast majority of psychologists holding doctorate degrees from accredited universities in the United States. Approximately half of the members have a direct interest in

psychological testing — the specific matter at issue in this case. However, because questions of the confidentiality and privilege of the relationship between a psychologist and his client are central to this case, all members of the Association, all other psychologists, and the clients whom they serve, could be directly and adversely affected by the decision of the National Labor Relations Board ("Board") as enforced by the Sixth Circuit.

One of the APA's central functions is to establish ethical standards for the guidance of psychologists. The Association's Code of Ethics, binding on all members, is maintained by a committee on ethics of Amicus. The committee, with the concurrence of the Board of Directors, has the authority to impose sanctions against members who violate the ethical code, including suspension or expulsion from the Association. Further, the APA's code of ethics has been incorporated in the laws of many states, thus governing the professional conduct of many non-member psychologists licensed in those states. In many cases, the state laws refer expressly to the Code of Ethics of Amicus.

The American Psychological Association has a direct interest in this matter, since several principles of its ethical code have been undermined by the decision of the Board as enforced by the Sixth Circuit. The most important are those which adversely affect the welfare of the psychologist's client — confidentiality and client relationship. However, important standards relating to test security have also been undermined by the decision below.

#### **CONSENT OF THE PARTIES**

Amicus American Psychological Association is filing this Brief with the consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

#### **QUESTIONS PRESENTED**

1. Whether Section 8(a)(5) of the National Labor Relations Act requires an employer to disclose to a union individual employees' raw scores on psychological aptitude tests without their consent, scores which were not furnished to management, when to do so intrudes upon the confidential professional relationship between the employees and the administering psychologists as required by the Code of Ethics of Amicus and incorporated into Michigan law.
2. Whether the decision of the Sixth Circuit enforcing a Board order requiring an employer to give directly to a union, rather than to a qualified psychologist of the union's choosing, copies of validated test batteries and actual test papers, to which management has no access, in violation of the Code of Ethics of the Amicus, as incorporated into Michigan law, ignores the interests of psychologists, future examinees, the employer, and other users of the test batteries, and is in conflict with Title VII of the Civil Rights Act of 1964, the guidelines of the Equal Employment Opportunity Commission on testing, and a decision of the Second Circuit.

#### **STATEMENT OF THE CASE**

This matter arises from a decision of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board requiring Detroit Edison ("Company") to provide to the Union employees' raw scores and test papers from psychological aptitude tests without their consent, and the actual test battery. Such disclosure by the administering psychologists contravenes the ethical standards of Amicus, standards incorporated in the laws of many states.

The case had its genesis in 1971 when the Company had six positions to fill at one of its facilities. Applicants for the positions had to meet several requirements including a minimum grade of "recommended" on a battery of aptitude tests consisting of two widely used, validated exams. The tests were administered by the Company's Industrial Psychology Division, headed by a member of APA licensed to practice psychology in the State of Michigan. The employees who took the psychological aptitude exams were given verbal and written assurances by the Company psychologists that their actual test scores would be kept in confidence and that only an interpretation of their overall performance would be released. The psychologists' pledges of confidentiality to the employees were honored and only a general evaluation of each applicant's performance was provided to management. To prevent misuse of test results and to protect the applicants from harassment or ridicule, the Company psychologists did not reveal the applicants' raw test scores or release their test papers.

The Union initiated a grievance proceeding when certain applicants were rejected for the positions for failure to obtain the required minimum grade. In the course of the arbitration and Board proceedings which followed, the Company furnished to the Union all of the following data: a written explanation of the tests, sample questions, and the written validation studies of each test. However, the Union also sought each applicant's raw test score and test paper. In an effort to accommodate both the Union and the confidential relationship between the psychologists and tested employees, the Company provided to the Union the raw test scores without, however, linking them to an individual employee's name. The Company also offered to disclose to the Union the raw test scores and actual test papers of any employee who consented to such disclosure; however, the Union refused to seek such consents. Without these consents, the psychologists were professionally obligated to maintain the confidentiality of the testing information.

The Union also demanded copies of the test batteries. Again, in an effort to accommodate the Union and to maintain the security of the tests, as required by the Code of Ethics of Amicus, the Company offered to furnish the test batteries to a qualified professional psychologist of the Union's choosing; the Union also refused this offer.

At the conclusion of the Board proceeding, the Company was ordered to disclose to the Union the raw test scores and actual test papers of the applicants, without their consent, and the battery of tests. The only protection ostensibly provided by the Board to safeguard the information was to order the Union not to copy the tests or to disclose them to past or future examinees. (App., p. 16a.) However, one Member of the Board, who would have required the Company to divulge the test batteries only to a qualified psychologist of the Union's choosing, noted the futility of the Board's restriction:

"There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how this Board can enforce its exhortation not to copy or disclose the tests." (App., p. 17a.)

And more importantly from the perspective of Amicus and the involved psychologists and examinees, the Board's restrictions applied only to the test batteries, not to the confidential test scores of the applicants.

When the Company did not comply with the Board's unnecessarily broad order, the Board sought enforcement in the Sixth Circuit. The appeals court, in a two-to-one decision, affirmed the Board's order forcing disclosure of the confidential information. In disregarding the confidential nature of the relationship between the psychologists and the employees, the majority of the panel concluded that "the principles which underlie the National Labor Relations Act are paramount in this case." (App., p.

8a.) The Court of Appeals held that the Company could not rely on a privilege which was personal to the employees who took the examination. (App., p. 8a.)

However, Judge Weick, in dissent, recognized the confidential and privileged relationship between the administering psychologists and the examinees. He found that:

“The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan.” (App., p. 9a.)

Judge Weick further noted that the test batteries sought by the Union “were in the custody of qualified psychologists” and that “the disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. §§ 14.677(1)(b).” (App., pp. 8a-9a.) Finally, Judge Weick held that the Board’s order constituted a gross abuse of discretion because it recognized only the interests of the Union and failed to consider any of the conflicting interests involved and thus should not be enforced. (App., p. 12a.)

## ARGUMENT

This case raises significant issues of confidentiality, privacy, and privilege in the psychologist-client relationship which are yet unresolved by this Court: may a union, in its capacity as bargaining agent, intrude upon an employee’s relationship with a company psychologist by demanding total and unrestrained access to confidential test scores and papers developed in the course of that relationship. APA does not question the right of a union to obtain information

necessary to carry out its responsibilities; Amicus does assert that the interests of employees in the confidentiality and privacy of their relationship with the testing psychologist, which have been totally disregarded in this case, deserve protection. Amicus also contends that the interests of psychologists in preserving the confidential nature of the psychologist-client relationship, in accord with the Code of Ethics of APA and the laws of many states, warrant protection similarly denied in this case.

The American Psychological Association respectfully submits that this Court should grant certiorari and hold that the confidential relationship between psychologist and client — in this case employees and the company’s industrial psychologists — must be protected from unbridled intrusion by a union in its role as bargaining agent. This Court should also recognize the ethical standards of Amicus, as incorporated in the laws of many states, which require psychologists to safeguard against the unauthorized distribution of testing materials and testing data so that those materials can be used effectively by other psychologists.

### I. This Court Should Grant Certiorari to Uphold the Confidentiality of the Psychologist-Client Relationship

(1) The relationship of a psychologist and his client is by its very nature a confidential and privileged one. The fact that the psychologist is retained by a company does not alter the confidentiality of that relationship.<sup>1</sup> The paramount importance of the confidential psychologist-client relationship is manifest in the Code of Ethics of the

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<sup>1</sup>See *Tweith v. Duluth, M&I Ry Co.*, 66 F. Supp. 427 (D.C. Minn. 1946).

American Psychological Association and in over twenty states by express statutory incorporation of that Code.<sup>2</sup>

The psychologist in the performance of his professional commitment deals with the details of an individual's life that are of a personal and private nature. In a testing situation, these include an individual's intelligence, attitudes, and psychological aptitudes. The examinee must be assured of the confidentiality of his relationship with the administering psychologist or he may refrain from participating in the psychological testing.

In the industrial context, psychological aptitude examinations are widely used for hiring determinations, initial job placement, and advancement. If the Board's unnecessarily broad order is allowed to stand, individuals may be forced to choose between employment or advancement and the possible ridicule and harassment that may occur when test results are disclosed to persons under no obligation to hold them in confidence. Employees who take company psychological exams should not be placed in such a position when means clearly less intrusive of the confidential psychologist-client relationship are available to the Union to enable it to fulfill its functions.

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<sup>2</sup>See, e.g., Ala. Code tit. 46, § 297(37) (Cum. Supp. 1973); Ark. Stat. Ann. § 72-1516 (Repl. Vol. 1957); Del. Code Ann. tit. 24, § 3513(a) (8) (Rev. Vol. 1974); Idaho Code § 54-2305(b) (Cum. Supp. 1975); Ind. Code § 25-33-1-13(a) (8) (Burns 1974); Kan. Stat. Ann. § 74-5308(a), 74-5324(d) (1972); Ky. Rev. Stat. Ann. § 319.081 (1972); Me. Rev. Stat. Ann. tit. 32, § 3816 (Supp. Pam. 1973); Me. Rev. Stat. Ann. tit. 32, § 3837 (Cum. Supp. 1975); Md. Ann. Code Art. 43, § 627 (1957); Mass. Ann. Laws ch. 112, § 119(d) (1975); Mich. Stat. Ann. § 14.677(1) (b) (Cum. Supp. 1975); Minn. Stat. Ann. § 148.95 (Cum. Supp. 1975); Miss. Code Ann. § 73-31-21(a) (1) (1972); Mont. Rev. Code Ann. § 66-3209(1) (d) (Cum. Supp. 1975); N.C. Gen. Stat. § 90-270-15(4) (Repl. Vol. 1975); N.D. Cent. Code § 43-32-27(7) (Supp. 1975); Okla. Stat. Ann. tit. 59, § 1361 (1971); Ore. Rev. Stat. § 675.110(10) (1974); Pa. Stat. Ann. tit. 63, § 1205(2) (Cum. Supp. 1975); S.C. Code Ann. § 56-1543.106 (Cum. Supp. 1975); Utah Code Ann. § 58-25-11(10) (Repl. Vol. 1974).

(2) Because the assurance of confidentiality is such an important aspect of the relationship between the psychologist and his client, the Code of Ethics developed by the Amicus<sup>3</sup> has been designed expressly to insure the maintenance of this confidentiality. The Board's order, as affirmed, directing disclosure of the actual test scores and papers of employees without their consent forces the industrial psychologist to violate the ethical principles designed specifically to protect the client or patient of a professional psychologist from unwanted dissemination of confidential matters.

The Association's ethical standards make it the psychologist's "primary obligation" to safeguard "information about an individual that has been obtained . . . in the course of his teaching, practice, or investigation. . . ." Disclosure of test scores without consent of the examinee, particularly to lay persons, directly contravenes this confidentiality standard.

Further, to protect examinees from misuse of test results, and from ridicule or harassment by their peers as a result of disclosure, the ethical principles of Amicus direct that psychologists release psychological test scores "only to persons who are qualified to interpret and use them properly." The Board's order requiring divulgence of actual test scores to the Union disregards the interests of the employees in keeping their scores from becoming common knowledge among their fellow workers. Since the Company provided the Union with a list of scores unidentified by individual employee name, no showing was or could be made that the Union needs the raw scores and test papers with employee identification.

Finally, the Board's order requires the industrial psychologist to violate a major tenet governing the

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<sup>3</sup>American Psychological Association. *Ethical Standards of Psychologists* (1972 ed.).

psychologist's relationship with his client, that of informing a prospective client in advance of important aspects of the potential relationship that might affect the client's decision to enter such a relationship. In the instant case, examinees were given oral and written assurances that their scores would be kept in confidence. The decision of the Court of Appeals would require psychologists to violate this principle and to repudiate the assurances of confidentiality given to the employees.

Because of the wide use of psychological tests in the industrial setting in the United States today, the issues raised by the Court of Appeals' enforcement of the Board's overly broad order, in total contravention of the ethical standards devised to govern the conduct of psychologists, should be reconsidered by this Court. If the Court of Appeals decision is allowed to stand, industrial psychologists throughout the United States will be placed in an ethical quandary in which they will have to decide whether to violate the ethics of their profession designed to protect their clients or to comply with a union's demand for unbridled access to raw test scores and examination papers when less intrusive means are available for a union to fulfill its functions as a bargaining agent.

(3) The ethical standards promulgated by Amicus govern not only the professional conduct of its members but also of many non-member psychologists. At least 20 states have incorporated the Code of Ethics of the Amicus in their licensing laws.<sup>4</sup> If this Court permits enforcement of the Board's order, the Company's psychologists will be forced to violate the licensing laws of the State of Michigan. Under the Michigan licensing statute, all persons certified to practice psychology "are subject to the provisions of the ethical standards promulgated by the Department, which standards shall be comparable to the ethical standards of the

American Psychological Association." Mich. Stat. Ann. § 14.677(1)(b) (Cum. Supp. 1975). The Michigan law further provides for suspension or revocation of a psychologist's license for dishonorable or unprofessional conduct. Mich. Stat. Ann. § 14.677(10) (6) (Cum. Supp. 1975). Disclosure of test scores in violation of these ethical principles would constitute such unprofessional conduct as contemplated by this statute.

Judge Weick, in his dissent, recognized that the disclosure of the test papers, as well as individual scores, could "subject the psychologist to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the State of Michigan." (App., p. 9a.)

Since so many states have adopted Amicus' ethical standards as part of their licensing laws, with serious consequences for licensed psychologists who breach them, this Court should grant certiorari to reconsider the decision of the Court of Appeals enforcing a Board order which places a psychologist in the position of violating either the ruling of an administrative agency or the licensing statute of the state in which he practices.

(4) Congress and the courts have repeatedly recognized the element of privacy and confidentiality with regard to certain personal, and particularly medical, information. Thus, the Freedom of Information Act, 5 U.S.C. § 552 (1970 & Supp. V 1975), though designed to insure public access to a wide range of government reports and information,<sup>5</sup> exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Thus, the Court of Appeals for the District of Columbia Circuit has held that exemp-

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<sup>4</sup>See note 2, *supra* at p. 8.

<sup>5</sup>5 U.S.C. § 552(c); see *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 76 (D.C. Cir. 1974).

tion six of the FOIA is "designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 77 (D.C. Cir. 1974).

The Board in this case failed to consider any balance between the Union's need for information and the employees' right to privacy with regard to personal information. The Union's need for test results could have been balanced with the employees' right to privacy by disclosure of the test scores without attribution. The Board's order failed to strike any such balance and should not be enforced.

Similarly, Federal law now prohibits funding to educational agencies or institutions which release personally identifiable information in education records. 20 U.S.C. § 1232g(b) (2) (Supp. V 1975). And in the Professional Standards Review Law, 42 U.S.C. § 1320(c) - 1320(c-19) (Supp. V 1975), Congress designed a system whereby the government could obtain accurate information concerning the costs and use of Medicare and Medicaid programs while still providing a mechanism to insure that medical information about patients would be maintained in a confidential manner. In upholding the constitutionality of this legislation against an attack that the reporting provisions violated patients' right of privacy, a three-judge district court emphasized that its decision was based in large part on the specific statutory provisions which were designed to assure proper confidentiality of patient information. *See Association of American Phys. & Sur. v. Weinberger*, 395 F. Supp. 125, 136-37 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975).

The decision of the Court of Appeals below, enforcing the Board's order, disregards the increasing recognition being accorded by Congress and the courts to an individual's right to privacy of information of a personal

nature, such as medical information, test results, and similar records. *See Rural Housing Alliance v. United States Dept. of Agr.*, *supra*, 498 F.2d at 77; 5 U.S.C. § 552(b) (6) (1970); 20 U.S.C. § 1232g(b) (2) (Supp. V 1975); 42 U.S.C. § 1320(c) *et seq.* (Supp. V 1975). Cf. *Roe v. Wade*, 410 U.S. 113, *reh. denied*, 410 U.S. 959 (1973); *Doe v. Bolton*, 410 U.S. 179, *reh. denied*, 410 U.S. 959 (1973). Because individuals are required to take psychological tests in so many settings in the United States today, this Court should grant certiorari to hold that the Board's order is an overly broad and unnecessarily intrusive invasion of the employees' right to privacy concerning confidential information.

(5) In ordering a company to provide information to a union, the Board is required to protect each of the conflicting interests involved. *See, e.g., Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968). The Board's order in this case took into account only the Union's interests. As Judge Weick noted in dissent, the failure of the Board to consider the interests of the Company, the examinees, and the psychologists, constituted a gross abuse of discretion and should not be enforced. (App., p. 12a.) This Court should grant certiorari and hold that the Board must consider the competing interests of the employees and psychologists in the protection of the confidential and privileged psychologist-client relationship.

## **II. This Court Should Grant Certiorari and Hold That The Company and Its Psychologists Should Not Be Required to Disclose to the Union The Actual Test Batteries**

The Board's unnecessarily broad order as enforced by the Sixth Circuit requires the Company and its psychologists to provide to the Union copies of the actual test batteries in conflict with the Code of Ethics of Amicus, the Guidelines of the Equal Employment Opportunity

Commission on testing, and a recent decision of the Second Circuit.

(1) The Code of Ethics of the Amicus requires psychologists to protect psychological tests from reproduction in ways that would invalidate the test techniques and to deny access to such tests to other than persons with professional interests who will safeguard their use. The Board's order as enforced by the Court of Appeals ignores the interests of psychologists in complying with these professional standards when it requires them to disclose the test batteries to union representatives who are under no obligation to safeguard their security.

The rationale for the ethical principles requiring test security is to prevent standardized tests from becoming invalid through dissemination to future examinees. The test batteries in question, the Minnesota Paper Form Board Test and the Engineering and Physical Aptitude Test, are standardized psychological tests, and thus have been validated and found reliable.<sup>6</sup> Only when a test has been found, through extensive research, to be both valid and reliable, does it meet the Amicus' *Standards for Educational and Psychological Tests* (American Psychological Association, 1974) which have been recognized by the Equal Employment Opportunity Commission in its guidelines on testing. See 29 C.F.R. Part 1607.

The Board's order, as affirmed by the appeals court, forces the psychologist to distribute validated tests to persons under no obligation to secure them from dissemination.

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<sup>6</sup>A "validated" test is one in which the final form of the test has been administered to a sufficiently large sample to determine the degree to which it measures that which it purports to measure. A "reliable" test is one in which either the same or an alternate form of the test has been administered more than once to the same examinees and the responses to each found to be similar. See American Psychological Association, *Standards for Educational and Psychological Tests* 16 (1974).

Amicus contends that if the decision of the Sixth Circuit is allowed to stand, test publishers will be unwilling in the future to distribute standardized tests to industrial psychologists employed by companies subject to the jurisdiction of the National Labor Relations Board.

Further, Amicus submits that the decision of the Sixth Circuit poses an unwarranted threat to distributors of personnel selection tests and to those persons engaged in the development of such tests. Such a threat to the field of personnel testing, through the loss of secure published tests and the inability of test developers to find volunteer subjects willing to take tests without assurance of confidentiality, might well force employers to turn to unreliable and subjective methods of selection, resulting in poor personnel selection practices and in possible violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970).

(2) The Guidelines of the Equal Employment Opportunity Commission on testing, adopted pursuant to Title VII of the 1964 Civil Rights Act, rely on testing standards developed by Amicus to ensure nondiscrimination in employment practices. The Sixth Circuit opinion, if allowed to stand by this Court, directly undermines the EEOC testing guidelines as based on the testing standards developed by Amicus. Specifically, Section 703(h) of Title VII allows employers to use professionally developed ability tests provided that neither the tests nor their administration is discriminatory. Pursuant to Section 703(h) of Title VII, the EEOC has developed testing guidelines which require that tests be standardized and validated pursuant to testing standards enunciated by APA. See 29 C.F.R. § 1607.5 (App., pp. 92a-93a).

The Board's order as affirmed by the Sixth Circuit disregards one of the important APA Standards referenced in the EEOC Guidelines which requires the test user to

share responsibility with the test developer for maintenance of test security. By requiring the Company to turn over the battery of tests to the Union rather than to a professional psychologist of the Union's choosing, the Board's order directly conflicts with APA testing standards as incorporated in the EEOC Guidelines.

This Court has on at least two occasions held that the EEOC Guidelines are entitled to great deference and has ruled specifically that a company could not use tests not properly validated under APA standards. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 435 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). If allowed to stand, the Sixth Circuit's decision could result in the dissemination of standardized tests to non-psychologists and their consequent invalidation under APA standards and the EEOC Guidelines. Since the Union's interests clearly can be met by disclosure of the test batteries to a qualified psychologist of the Union's choosing, without creating a conflict with Title VII or the EEOC Guidelines issued pursuant thereto, the Board's overly broad order requiring dissemination of the test batteries to the Union should not be allowed to stand.

(3) The decision of the Sixth Circuit also conflicts with a recent decision of the Second Circuit. *Kirkland v. New York St. Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975). In *Kirkland*, a race discrimination case, the Second Circuit overturned that part of a district court's order requiring defendant to make available for plaintiffs' review a new promotion test. 520 F.2d 427, 431. Addressing the issues of test security and prejudice to future examinees raised by Amicus herein, the Second Circuit held in *Kirkland*:

"The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult

to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiffs' expert, his order should so provide; and proper steps should be taken to insure confidentiality." 520 F.2d at 427.

The decision of the Sixth Circuit in this case, ordering dissemination of the test battery to lay persons who have no obligation to maintain the security of those tests, is in direct conflict with the Second Circuit's decision in the *Kirkland* case. Though not the traditional conflict wherein two circuit courts of appeal have construed the same statute differently, the Second Circuit's decision in *Kirkland* and the Sixth Circuit's in this case reach opposite conclusions on the question of the extent to which test security must be guarded if psychological tests are not to be rendered invalid through dissemination. This Court should accept certiorari in this case to resolve the conflict over principles governing test security and testing procedures.

## CONCLUSION

For these reasons, Amicus American Psychological Association respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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